80-1792
No.

Office-Supreme Court, U.S.
FILED
APR 17 1981
ALEXANDER L. STEVAS,
CLERK

In The

Supreme Court of the United States

October Term, 1980

WILLIAM DOUGLAS HODGES,

Petitioner,

vs.

HAROLD BROWN, Secretary of Defense EDWARD HILDAGO, Secretary of the Navy and ADMIRAL C. BRETTSCHNEIDER, Commanding Officer 4th Naval District, Philadelphia, Pennsylvania,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

GENE D. COHEN
Attorney for Petitioner
2nd Floor - 1201 Chestnut Street
Philadelphia, Pennsylvania 19107
(215) 564-1880

4171 LUTZ APPELLATE PRINTERS, INC.
NY (212) 840-9494 • (516) 222-1606 • (914) 683-9363
NJ (201) 257-6850 • PA (215) 563-5587 • DC (202) 783-7288 • MA (617) 227-1133

QUESTION PRESENTED

Where an individual alleges that his enlistment in the Armed Forces is void, may the federal courts grant habeas corpus relief and enjoin court martial proceedings?

TABLE OF CONTENTS

Page

Question Presented i

Table of Contents ii

Table of Citations ii

Opinion Below 2

Jurisdiction 2

Constitutional and Statutory Provisions involved 2

Statement of the Case 3

Reasons for Granting the Writ:

I. The decision below conflicts with applicable decisions of this Court by eliminating habeas corpus relief prior to the exhaustion of military judicial remedies where *in personam* jurisdiction of a court martial is challenged. 5

Conclusion 7

TABLE OF CITATIONS

Cases Cited:

Apple v. Greer, 554 F. 2d 105 (1977) 6

McElroy v. Guagliardo, 361 U.S. 281 (1960) 5

Contents

Page

Parisi v. Davidson, 405 U.S. 34 (1972) 6

Reid v. Covert, 354 U.S. 1 (1957) 5

Schlesinger v. Councilman, 420 U.S. 738 (1974) 5, 6

Toth v. Quarles, 350 U.S. 11 (1955) 5, 7

Statute Cited:

28 U.S.C. §1254(1) 2

United States Constitution Cited:

Article I, Section 9, Clause 2 ..... 2, 6

Fifth Amendment 2

APPENDIX

Judgment Order of the United States Court of Appeals for the Third Circuit 1a

Opinion of the United States District Court for the Eastern District of Pennsylvania 3a

No.

In The

Supreme Court of the United States

October Term, 1980

WILLIAM DOUGLAS HODGES,

Petitioner,

vs.

HAROLD BROWN, Secretary of Defense EDWARD HILDAGO, Secretary of the Navy and ADMIRAL C. BRETTSCHNEIDER, Commanding Officer 4th Naval District, Philadelphia, Pennsylvania,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner William Douglas Hodges prays that this Court issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit, which affirmed a judgment granting respondents' motion to dismiss entered by the United States District Court for the Eastern District of Pennsylvania.

OPINION BELOW

The United States Court of Appeals for the Third Circuit affirmed the judgment of the United States District Court for the Eastern District of Pennsylvania by means of a judgment order. The opinion of the district court is set forth in the appendix, *infra,* and has been reported in 500 F. Supp. 25 (1980).

JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on March 18, 1981. This petition for certiorari was filed within 30 days of the date of the judgment order. Jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, Section 9, Clause 2 of the United States Constitution:

> "The privilege of the Writ of Habeas Corpus shall not be suspended, unless when in cases of Rebellion or Invasion the public safety may require it."

The Fifth Amendment to the United States Constitution:

> "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of

war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall any person be compelled to be a witness against himself nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation."

STATEMENT OF THE CASE

William Douglas Hodges is currently considered by Naval authorities to be an enlisted man in the United States Navy. He is 19 years old and was born on May 13, 1961. His home of record is West Goshen, Pennsylvania.

On May 31, 1978, petitioner was enlisted in the Navy under the deferred enlistment program and was sworn into the regular Navy on October 25, 1978. At the time of his enlistment, petitioner was 17 years old, had completed 9 years of education and was in the 10th grade at East Senior High in West Goshen, Pennsylvania.

Having completed less than 11 years of education, petitioner was not eligible for enlistment in the Navy. His application for enlistment and other enlistment documents record 11 years of education completed.

Petitioner has signed a review of documents averring that the information in his enlistment documents were accurate, and had also signed a statement that he had reviewed his application for enlistment, and that the information supplied by him was accurate.

The Navy recruiting officer used form DD370 to verify educational information listed in petitioner's application for

enlistment. The recruiting office completed three items on the form contra to instructions prior to its submission to petitioner's school. These items were the relationship of the reference to the applicant, highest grade completed, and reason applicant left school. The form was subsequently signed by the assistant principal.

After completion of basic training, petitioner was assigned to the Naval Air Technical Training Center located in Millington, Tennessee. On April 3, 1979, petitioner was charged with Article 86, Uniform Code of Military Justice, for his unauthorized absence from his organization. This charge was referred to court martial on April 4, 1979.

On April 10, 1979, prior to court martial, petitioner commenced another period of unauthorized absence.

On March 10, 1980, petitioner surrendered himself to Naval authorities at the Philadelphia Naval Base. The petitioner had commenced his unauthorized absence prior to his 18th birthday.

It was agreed by the parties to this case that for purposes of motions for summary judgment, that William Evans, Navy Recruiter, knew or should have known that William Douglas Hodges was in the 10th grade at the time of his enlistment in the United States Navy, and was ineligible for enlistment under applicable recruiting regulations.

On March 11, 1980, petitioner filed a complaint in equity seeking an injunction and declaratory relief with the United States District Court for the Eastern District of Pennsylvania, and also seeking habeas corpus relief. Petitioner alleged that his enlistment was procured by the Navy unlawfully, and that his enlistment was void. No administrative remedies were available to him at the time that this action was commenced.

The Navy filed an answer and after agreeing to a stipulated set of facts, filed motions for summary judgment and a motion to dismiss.

Petitioner filed a cross motion for summary judgment.

The Honorable Charles R. Weiner of the district court denied both motions for summary judgment, but granted the respondents' motion to dismiss.

Petitioner filed an appeal with the United States Court of Appeals for the Third Circuit. On March 18, 1981, by means of judgment order, the trial court was affirmed.

REASONS FOR GRANTING THE WRIT

I.

The decision below conflicts with applicable decisions of this Court by eliminating habeas corpus relief prior to the exhaustion of military judicial remedies where *in personam* jurisdiction of a court martial is challenged.

In *Schlesinger v. Councilman,* 420 U.S. 738 (1974), the Supreme Court distinguished the several military habeas cases in which the Court has not required exhaustion of remedies in the military system before allowing collateral relief. The cases of *Toth v. Quarles,* 350 U.S. 11 (1955); *Reid v. Covert,* 354 U.S. 1 (1957), and *McElroy v. Guagliardo,* 361 U.S. 281 (1960), are cited as cases where habeas petitioners were civilians who contended that Congress had no constitutional power to subject them to the jurisdiction of court martial. The Supreme Court stated that the issue presented in the aforementioned cases concerned not only the military court's jurisdiction, but also

whether under Article I Congress could allow the military to interfere with the liberty of civilians, even for the limited purpose of forcing them to answer to the military justice system.

In *Parisi v. Davidson,* 405 U.S. 34 (1972), the Supreme Court indicated that when an individual challenges the *in personam* jurisdiction of a court martial, and has no administrative remedy, federal courts may intervene and grant habeas relief.

The lower court based its decision to dismiss on a misreading of *Schlesinger v. Councilman* by failing to make a distinction between a challenge to the subject matter jurisdiction of a court martial and an *in personam* jurisdiction challenge, which is essentially what the instant case is.

The lower court followed the Third Circuit Court of Appeals decision in *Apple v. Greer,* 554 F. 2d 105 (1977), which in petitioner's view is a misreading of *Schlesinger v. Councilman, supra,* and *Parisi v. Davidson, supra.* It did not appear to be the intention of the Supreme Court in *Schlesinger v. Councilman, supra,* to remove the equity jurisdiction of the federal court from all cases involving a challenge to the jurisdiction of a court martial.

> "We hold that when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the Federal District Courts must refrain from intervention by way of injunction or otherwise." At page 758.

The Supreme Court did not hold, as the courts below have so interpreted, that when an individual claims that he is not a

serviceman but is charged with crimes by military authorities, that he cannot seek relief from the federal system, but must first subject himself to the military courts.

This Court should recognize the fundamental distinction between a subject matter jurisdiction challenge, and an *in personam* jurisdiction challenge. To do otherwise would be to obliquely overrule cases like *Toth* and its progeny and violate the constitutional rights of individuals who claim that the military has no right to cause a disruption to their lives and the accompanying deprivation of liberty.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment order of the Third Circuit and the opinion of the United States Court for the Eastern District of Pennsylvania in this case.

Respectfully submitted,

GENE D. COHEN
Attorney for Petitioner

APPENDIX

JUDGMENT ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 80-2355

WILLIAM DOUGLAS HODGES,

Appellant

v.

HAROLD BROWN, Secretary of Defense and EDWARD HILDAGO, Secretary of the Navy and ADMIRAL C. BRETTSCHNEIDER, Commanding Officer

(Civil No. 80-00993 - E.D. of Pa.)

Argued March 17, 1981

BEFORE: SEITZ, *Chief Judge,* VAN DUSEN and GIBBONS, *Circuit Judges.*

After consideration of the contention raised by appellant, it is

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

Judgment Order

By the Court,

s/ Seitz
Chief Judge

ATTEST:

s/ Sally Mrvos
Sally Mrvos
Clerk

DATED: Mar. 18, 1981

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. NO. 80-0993

WILLIAM DOUGLAS HODGES

VS.

HAROLD BROWN, Secretary of Defense

and

EDWARD HILDAGO, Secretary of the Navy

and

ADMIRAL C. BRETTSCHNEIDER, Commanding Officer, 4th Naval District Philadelphia, Penna.

WEINER, J. AUGUST 15, 1980

Plaintiff, an enlisted man in the United States Navy, brought this action against the defendants alleging that his enlistment is void, and that defendants have no authority to require him to complete military service or to face military justice for his unauthorized absences from duty.

Plaintiff asks for injunctive relief from military prosecution, mandamus relief to compel the Navy to grant plaintiff an honorable discharge with attendant benefits, a writ of habeas corpus declaring plaintiff's enlistment void and retention of the

plaintiff by the military unlawful, and declaratory relief. Plaintiff further contends that defendants threaten him with irreparable damage in violation of his right to due process by retaining him in their custody against his will and subjecting him to immediate prosecution before a military tribunal without the constitutional safeguards of bail and a trial by jury. Defendants filed an answer denying plaintiff's allegations. Plaintiff alleges jurisdiction of this court is conferred by 28 U.S.C.A. §§1331,[1] 1361,[2] 2241.[3]

---

1. 28 U.S.C.A. §1331 (1958) (as amended, 1976), Federal question; amount in controversy; costs.

> (a) The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States except that no such sum or value shall be required in any such action brought against the United States, any agency thereof, or any officer or employee thereof in his official capacity.

2. 28 U.S.C.A. §1361 (1962), Action to compel an officer of the United States to perform his duty.

> The district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the plaintiff.

3. 28 U.S.C.A. §2241 (1948), Power to grant writ.

> (a) Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had. . . .

Opinion

Presently before the Court is a motion of the defendants to dismiss or in the alternative for summary judgment, and a motion of the plaintiff for summary judgment. For the reasons which follow, the plaintiff's motion for summary judgment is denied, the defendants' motion for summary judgment is denied and the defendants' motion to dismiss is granted.

Plaintiff and defendants have stipulated the following facts: On May 31, 1978, plaintiff enlisted in the Navy under the Deferred Enlistment Program and was sworn into the Regular Navy on August 25, 1978. At the time of his enlistment in the Navy, plaintiff was seventeen years old, having been born on May 13, 1961, and his parents consented to his enlistment.[4] Presently, plaintiff is nineteen years old. At the time of his enlistment, plaintiff was in the tenth grade at East Senior High School in West Goshen, Pennsylvania. Having completed less than eleven years of education, plaintiff was not eligible for enlistment in the Navy. Plaintiff's application for enlistment and other enlistment documents reveal that plaintiff had completed eleven years of education. Plaintiff signed a Review of Documents statement averring that the information in his enlistment documents was accurate, and also signed a statement in his enlistment agreement that he had reviewed his application

4. *See:* 10 U.S.C.A. §505 (1968), Regular components; qualifications, term, grade.

> (a) The Secretary concerned may accept original enlistments in the . . . , Regular Navy, . . . , of qualified, effective, and able-bodied persons who are not less than seventeen years of age, nor more than thirty-five years of age. However, no person under eighteen years of age may be originally enlisted without the written consent of his parent or guardian, if he has a parent or guardian entitled to his custody and control. . . .

for enlistment and found the information supplied by him was accurate. The assistant principal at plaintiff's high school verified that plaintiff had completed the eleventh grade by signing a form supplied to him by the recruiting office with that information already filled in on the form. This was contrary to instructions provided the recruiting office. It should have sent the school the form without that information so that the school officials could fill in the highest grade completed by the plaintiff. After completion of basic training, plaintiff was assigned to the Naval Air Technical Training Center (NATTC), located at the Naval Air Station Memphis, Millington, Tennessee. On April 3, 1979, plaintiff was charged with Article 86 of the Uniform Code of Military Justice (UCMJ), for his unauthorized absence from his organization from December 18, 1978 to February 15, 1979. This charge was referred to a Summary Court-Martial on April 4, 1979. On May 10, 1979, prior to the court-martial hearing, plaintiff commenced another period of unauthorized absence. On March 10, 1980, plaintiff surrendered himself to Naval Authorities at the Philadelphia Naval Base, where he is presently in custody.

For the limited purpose of ruling on plaintiff's motion for summary judgment, the parties have also stipulated that the Navy recruiter knew or should have known that the plaintiff was unacceptable for military service by reason of his lack of education, but recruited plaintiff into the Navy in violation of Navy and Department of Defense Regulations.

Plaintiff argues that his enlistment is *void ab initio* on the basis of the recruiter's misconduct and that therefore the military court lacks jurisdiction over him. In support of his contention, plaintiff relies upon *United States v. Russo,* 23 U.S.C.M.A. 511, 50 C.M.R. 650 (1975). In *Russo,* the Court of Military Appeals

held that an enlistment is *void ab initio* for the purposes of the Uniform Code of Military Jurisdiction, where a recruiter's misconduct amounts to a violation of the fraudulent enlistment statute.[5]

In support of defendants' motion for summary judgment, defendants rely upon *In Re Grimley*, 137 U.S. 147, 11 S. Ct. 54, 34 L. Ed. 636 (1890), and the 1979 amendment to Article 2 of the U.C.M.J., 10 U.S.C.A. §802.[6] In *Grimley*, the Supreme

5. Article 84, Uniform Code of Military Justice, 10 U.S.C.A. §884 (1956), Unlawful enlistment, appointment, or separation.

> Any person subject to this chapter who effects an enlistment or appointment in or a separation from the armed forces of any person who is known to him to be ineligible for that enlistment, appointment, or separation because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct.

6. Article 2, Uniform Code of Military Justice, 10 U.S.C.A. §802 (1956) (amended 1979), Persons subject to this chapter.

> (a) The following persons are subject to this chapter: . . .
>
> (b) The voluntary enlistment of any person who has the capacity to understand the significance of enlisting in the armed forces shall be valid for purposes of jurisdiction under subsection (a) of this section and a change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment.
>
> (c) Notwithstanding any other provision of law, a person serving with an armed force who —

(Cont'd)

Court held that voluntariness and capacity are the only two requirements for a valid enlistment. *Grimley, supra,* at 151-153. Thus, the Court rejected the petitioner's claim that his enlistment was void *ab initio* because he misrepresented his age to the army recruiter and therefore did not meet the age requirement at the time of his enlistment. In November, 1979, Congress specifically addressed the issue of the effect of recruiter misconduct on resulting enlistments and amended Article 2 of the U.C.M.J., 10 U.S.C.A. §802(a), to overrule the *Russo* doctrine and codify the enlistment validity test of *Grimley*. Plaintiff contends that to apply the 1979 amendment to the present case would be unconstitutional, and that the amendment must be applied prospectively in order to avoid being classified as an *ex post facto* law.[8] Defendants contend, *inter alia,* that military status

(Cont'd)

> (1) submitted voluntarily to military authority;
>
> (2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;
>
> (3) received military pay or allowances; and
>
> (4) performed military duties; is subject to this chapter until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

8. U.S. Const. art. I §9, Cl. 3. No Bill of Attainder or *ex post facto* law shall be passed. *Id.* An ex post facto law has been defined as any statute which punishes an act previously committed, which was innocent when the act was done, or increases the punishment for a crime after its commission, or deprives one charged with a crime of any defense available at the time when the act was committed. *Beazell v. Ohio,* 269 U.S. 167, 169-70, 46 S. Ct. 68, 70 L. Ed. 216 (1925).

per se is not punishment; no *ex post facto* argument can therefore be made with respect to the application of the statute to determinations of military status; and that under the U.C.M.J., as amended, plaintiff became a member of the military upon taking the oath of enlistment. We need not reach the merits of plaintiff's and defendants' contentions since the concept of comity between civilian and military courts mandates that this court refrain from exercising equitable jurisdiction in this matter until the military court system has had the opportunity to hear and fully adjudicate the claims.

It is well settled that the writ of habeas corpus is an appropriate remedy for servicemen who claim to be unlawfully retained in the armed services. *Parisi v. Davidson,* 405 U.S. 34, 39, 92 S. Ct. 815, 31 L. Ed. 2d 17 (1972); *Schlanger v. Seamans,* 401 U.S. 487, 489, 91 S. Ct. 995, 28 L. Ed. 2d 251 (1971); *Oesterich v. Selective Service Board,* 393 U.S. 233, 235, 89 S. Ct. 414, 21 L. Ed. 2d 402 (1968). However, the Supreme Court has stated that considerations requiring non-intervention in military proceedings are analagous to and as compelling as considerations of comity precluding equitable intervention in state criminal proceedings. *Gusik v. Schildes,* 340 U.S. 128, 131, 71 S. Ct. 149, 95 L. Ed. 146 (1950). Military courts, like state courts, have the same responsibilities and are equally as capable as the federal courts to protect a person's constitutional rights. *Burns v. Wilson,* 346 U.S. 137, 143, 73 S. Ct. 1045, 97 L. Ed. 1508 (1953).

It is the opinion of this court that the military tribunal is capable of addressing the jurisdictional issue in the instant case. The Supreme Court has faced situations in which servicemen have requested a writ of habeas corpus when court-martial proceedings were pending, and the petitioner claimed that the military courts lacked jurisdiction. In *Schlesinger v.*

Councilman, 420 U.S. 738, 95 S. Ct. 1300, 43 L. Ed. 2d 591 (1975), a serviceman sought to enjoin court martial proceedings on the grounds that the offenses he was charged with were not "service connected", and therefore were not within the jurisdiction of the military courts. The court declared that comity barred intervention of the federal courts while court martial proceedings were pending. The Supreme Court stated that military courts are as capable as civilian courts to determine whether the offenses were "service connected". If the military courts found that the offenses were not service connected, the tribunal would have to order dismissal of the charges, since it would lack subject matter jurisdiction. *Schlesinger v. Councilman, supra,* at 761; *Accord:* 554 F.2d 105 (3d Cir. 1977); *Sedivy v. Richardson,* 485 F.2d 1115 (3d Cir. 1973). In the instant case, plaintiff can raise the jurisdictional issue before the military court.

Plaintiff's requests for mandamus and declaratory judgment are dependent upon this court's granting or denial of habeas corpus relief to the plaintiff. Since we have determined that the proper forum for considering plaintiff's habeas corpus claim is in the military courts, this court will not consider plaintiff's requests for mandamus and injunctive relief.

Finally, plaintiff's claim for injunctive relief is without merit. Hodges alleges that the defendants threaten him with irreparable injury by maintaining him in their custody against his will in violation of his right of due process and by subjecting him to immediate prosecution before a military tribunal without the constitutional safeguards of bail and a trial by jury. It is well settled, however, that when a serviceman charged with crimes by military authorities can show no harm other than that attendant to resolution of his case in the military court system, the federal

court must abstain from intervening by way of injunctive relief. *Schlesinger v. Councilman, supra,* at 758; *see Apple v. Greer, supra; Sedivy v. Richardson, supra.*

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

C.A. NO. 80-0993

WILLIAM DOUGLAS HODGES

VS.

HAROLD BROWN, Secretary of Defense

and

EDWARD HILDAGO, Secretary of the Navy

and

ADMIRAL C. BRETTSCHNEIDER, Commanding Officer, 4th Naval District, Philadelphia, Penna.

ORDER

The motion of defendants to dismiss is GRANTED.

The motion of defendants for summary judgment is DENIED.

Opinion

The motion of plaintiff for summary judgment is DENIED.

IT IS SO ORDERED.

s/ Charles R. Weiner
CHARLES R. WEINER

Office-Supreme Court, U.S.
FILED
JUN 30 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1792

In the Supreme Court of the United States

OCTOBER TERM, 1980

WILLIAM DOUGLAS HODGES, PETITIONER

v.

CASPAR W. WEINBERGER,
SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

WADE H. MCCREE, JR.
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

LEONARD SCHAITMAN
SANDRA WIEN SIMON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether the district court correctly refused to enjoin court-martial proceedings against petitioner and to order his release from the Navy on the grounds that petitioner was ineligible to enlist in the Navy and was enlisted in violation of a recruiting office instruction.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	10

TABLE OF AUTHORITIES

Cases:

Grimley, In re, 137 U.S. 147	5, 7
McElroy v. *Guagliardo*, 361 U.S. 281	4
Noyd v. *Bond*, 395 U.S. 683	5, 6, 8
Parisi v. *Davidson*, 405 U.S. 34	8, 9
Reid v. *Covert*, 345 U.S. 1	4
Schlesinger v. *Councilman*, 420 U.S. 738	3, 4, 5, 6, 8
Toth v. *Quarles*, 350 U.S. 11	4, 6
United States v. *Caceres*, 440 U.S. 741	8
United States v. *Russo*, 1 M.J. 134	5, 6, 7, 8
Usery v. *Turner Elkhorn Mining Co.*, 428 U.S. 1	8

Statutes and regulation:

10 U.S.C. 505(a)	2
10 U.S.C. (Supp. III) 802(b)	7
10 U.S.C. (Supp. III) (802(c)	7
10 U.S.C. 884	5, 6
10 U.S.C. 1552	9
28 U.S.C. 2241(c)(3)	9
32 C.F.R. Part 723	9

Miscellaneous:

S. Rep. No. 96-197, 96th Cong., 1st Sess. (1979)	7

In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-1792

WILLIAM DOUGLAS HODGES, PETITIONER

v.

CASPAR W. WEINBERGER,
SECRETARY OF DEFENSE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not reported. The opinion of the district court (Pet. App. 3a-12a) is reported at 500 F. Supp. 25.

JURISDICTION

The judgment of the court of appeals was entered on March 18, 1981. The petition for a writ of certiorari was filed on April 27, 1981, as of April 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, with the consent of his parents, enlisted in the Navy on May 31, 1978. At that time, petitioner was 17 years old and in the tenth grade; because he had not completed eleven years of education, petitioner was not eligible to enlist in the Navy.[1] His enlistment application and other documents, however, stated incorrectly that he had completed the eleventh grade, and petitioner signed two statements that the information in those documents was correct (Pet. App. 5a-6a).

The recruiting officer sent petitioner's school a form asking for confirmation of the information petitioner provided. Recruiting office instructions required that the form leave a blank space where school officials could supply the number of years of education an applicant had completed. Instead of follow-

---

[1] 10 U.S.C. 505(a) provides, in part:

> The Secretary * * * may accept original enlistments in the * * * Regular Navy * * * of qualified, effective, and able-bodied persons who are not less than seventeen years of age nor more than thirty-five years of age. However, no person under eighteen years of age may be originally enlisted without the written consent of his parent or guardian, if he has a parent or guardian entitled to his custody and control.

This provision does not refer to education level. We are advised by the Department of the Navy, however, that under the Navy Recruiting Manual, an applicant was ineligible to enlist unless he achieved a certain score on an index designed to predict success in the Navy. This index reflected age, number of dependents, aptitude, and other factors, as well as education level. Petitioner qualified under this index only because he was treated as having had eleven years' education when he enlisted; the government stipulated that if accurate information had been used, petitioner would not have been eligible to enlist.

ing these instructions, the recruiting officer sent a form with the information already supplied. A school official signed the form without correcting the error. For purposes of the summary judgment motions and the motion to dismiss in this case, the parties stipulated that the recruiter knew or should have known that petitioner was ineligible for military service and that he recruited petitioner in violation of applicable regulations (Pet. App. 6a).

Petitioner took the required oath and entered the Navy on August 25, 1978 (Pet. App. 5a). On April 3, 1979, after petitioner had completed his basic training and been assigned to duty, he was charged with unauthorized absence from his organization, in violation of Article 86 of the Uniform Code of Military Justice. The charge was referred to a summary court-martial, but on May 10, 1979, before court-martial proceedings began, petitioner again left his organization without authorization. On March 10, 1980, he surrendered himself to the Navy (Pet. App. 6a).

While petitioner's court-martial proceedings were pending, he brought this action in the United States District Court for the Eastern District of Pennsylvania, claiming that his enlistment was invalid and seeking an order enjoining his military prosecution and compelling the Navy to discharge him from service (Pet. App. 3a-4a). Relying on *Schlesinger* v. *Councilman*, 420 U.S. 738 (1975), the district court dismissed the complaint, holding that petitioner's proper remedy was to raise his claims in the military courts (Pet. App. 9a-11a). The court of appeals summarily affirmed (*id.* at 1a-2a).

ARGUMENT

The district court correctly held that petitioner's effort to enjoin the court-martial proceedings was barred by *Schlesinger* v. *Councilman, supra.* In *Councilman,* a serviceman attacked the jurisdiction of a court-martial on the ground that the offense with which he was charged was not " 'service connected' " (420 U.S. at 740). This Court held that because the serviceman could "show no harm other than that attendant to resolution of his case in the military court system," it was improper for a federal district court to enjoin the court-martial proceedings. *Id.* at 758. Petitioner attempts to distinguish *Councilman* on the ground that *Councilman* involved a challenge to the subject matter jurisdiction of the court-martial, whereas petitioner challenges the court-martial's "*in personam* jurisdiction" (Pet. 6). In this connection, petitioner cites (Pet. 5) three cases—*Toth* v. *Quarles,* 350 U.S. 11 (1955), *Reid* v. *Covert,* 354 U.S. 1 (1957), and *McElroy* v. *Guagliardo,* 361 U.S. 281 (1960)—in which the Court permitted collateral federal proceedings to interrupt courts-martial. For several reasons, however, petitioner's argument fails.

First, the Court in *Councilman,* in distinguishing the *Toth* line of cases, relied not on a formal distinction between "in personam" jurisdiction and "subject matter" jurisdiction but on much more substantial bases. In *Toth, Reid,* and *McElroy,* the Court observed, the petitioners seeking to interrupt the courts-martial "were *civilians* who contended that Congress had no constitutional power to subject them to the jurisdiction of courts-martial" (420 U.S. at 759). The Court explained that, for this reason, it would have been unfair and perhaps unconstitutional to require them to submit to the military justice sys-

tem. See *ibid.*; *Noyd* v. *Bond*, 395 U.S. 683, 696 n.8 (1969).

Petitioner, however, like the serviceman in *Councilman*, "was on active duty when the charges against him were brought" (420 U.S. at 759). Moreover, petitioner suggests no basis for a constitutional challenge to the jurisdiction of the court-martial. It is undisputed that petitioner voluntarily and knowingly enlisted in the Navy with the consent of his parents; he concealed the facts which demonstrated that he was ineligible. He does not allege that the recruiter misled him to his prejudice or coerced him. This Court long ago held that a serviceman in such a position may constitutionally be tried by court-martial (see *In re Grimley*, 137 U.S. 147 (1890)), and there is no unfairness in remitting petitioner to a system of military justice that he voluntarily accepted. In addition, the basis for petitioner's challenge to the court-martial's jurisdiction appears to be the decision of the Court of Military Appeals in *United States* v. *Russo*, 1 M.J. 134 (C.M.A. 1975), which held that "where recruiter misconduct amounts to a violation of the fraudulent enlistment statute [10 U.S.C. 884,[2]] * * * the resulting enlistment is void as contrary to public policy" and the court-martial lacks jurisdiction over the enlisted person. 1 M.J. at 137. The Court of Military Appeals based this

---

[2] 10 U.S.C. 884 provides:

> Any person subject to [the Uniform Code of Military Justice] who effects an enlistment or appointment in or a separation from the armed forces of any person who is known to him to be ineligible for that enlistment, appointment, or separation because it is prohibited by law, regulation, or order shall be punished as a court-martial may direct.

doctrine—which has since been overruled by Congress (see pages 6-7, *infra*)—principally on the need to provide an added deterrent to violations of 10 U.S.C. 884 (see 1 M.J. at 136). It did not suggest that a voluntary and knowing enlistment would be constitutionally defective.

Second, this Court has suggested that the decisive element in the *Toth* line of cases was that military courts have no special expertise in resolving "constitutional claims of the type presented" there. *Noyd* v. *Bond*, *supra*, 395 U.S. at 696 n.8; *Schlesinger* v. *Councilman*, *supra*, 420 U.S. at 759; see *id.* at 763-765 & n.1 (Brennan, J., dissenting). Not only is petitioner's claim not constitutionally based, but a court considering the claim must have at least as much specialized knowledge of military life as a court considering the claim of "service connectedness" involved in *Councilman*. While the government has conceded here that the recruiter did not follow regulations, the question remains whether the recruiter's actions justify barring court-martial jurisdiction. This requires an assessment of the severity of the violation, an appreciation of whether it prejudiced petitioner or only the Navy, and knowledge of how widespread such violations are and of what sanctions might deter them. All of these matters are within the expertise of military courts.

Finally, the Court has noted that the plaintiffs in the *Toth* line of cases "raised substantial arguments denying the right of the military to try them" (*Noyd* v. *Bond*, *supra*, 395 U.S. at 696 n.8). Petitioner's claim on the merits is insubstantial. On November 9, 1979, Congress amended the Uniform Code of Military Justice to make clear that the U.C.M.J. applies to any person who voluntarily enlists with "* * * the

capacity to understand the significance of enlisting in the armed forces * * *. [A] change of status from civilian to member of the armed forces shall be effective upon the taking of the oath of enlistment." 10 U.S.C. (Supp. III) 802(b).[3] This amendment was enacted expressly to overrule the *Russo* doctrine, which, the Senate Committee stated, "created a serious problem in the military services * * *. The committee strongly believes that these doctrines serve no useful purpose, and severely undermine discipline and command authority. No military member who voluntarily enters the service and serves routinely for a time should be allowed to raise for the first time after committing an offense defects in his or her enlistment, totally escaping punishment for offenses as a result." S. Rep. No. 96-197, 96th Cong., 1st Sess. 121 (1979).

Petitioner does not and cannot deny that he fits within the terms of the 1979 amendment. Nor does he contend that the amendment is unconstitutional. See *In re Grimley, supra.*[4] Thus petitioner's claim is

---

[3] The amendment also provides (10 U.S.C. (Supp. III) 802(c)):

> Notwithstanding any other provision of law, a person serving with an armed force who—
>
> (1) submitted voluntarily to military authority;
>
> (2) met the mental competency and minimum age qualifications of sections 504 and 505 of this title at the time of voluntary submission to military authority;
>
> (3) received military pay or allowances; and
>
> (4) performed military duties;
>
> is subject to [the U.C.M.J.] until such person's active service has been terminated in accordance with law or regulations promulgated by the Secretary concerned.

[4] In the courts below, petitioner urged that the amendment cannot be applied retroactively. The legislative history, in describing *Russo* as an anomaly damaging to military discipline, strongly suggests that Congress intended to apply the

not sufficiently substantial to justify the extraordinary remedy of interfering with the pending court-martial proceedings.

Petitioner's reliance on *Parisi* v. *Davidson*, 405 U.S. 34 (1972), is misplaced. *Parisi* did not involve the same issue as *Councilman*; the Court specifically noted that "the issue in this case does not concern a federal district court's direct intervention in a case arising in the military court system" (*id.* at 41). *Parisi* concerned a serviceman who sought habeas corpus relief in order to obtain his release from the military. The Court held that the district court was required to entertain the serviceman's claim, even though court-martial proceedings were pending against him. But it was crucial to the Court's decision that the serviceman had exhausted his administrative remedies before seeking habeas corpus relief. See *id.* at 37, 45.

---

amendment retroactively. Congress may legislate retroactively where its action is not irrational or unnecessarily burdensome (see *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 17-19 (1976)); the interests identified by Congress show that the retroactive abolition of the *Russo* doctrine is reasonable. Moreover, petitioner does not allege that he somehow relied on the *Russo* doctrine for assurance that he could violate military law with impunity (see *United States* v. *Caceres*, 440 U.S. 741, 752-753 (1979)) and it is unlikely that any such reliance would be justifiable.

In any event, one of petitioner's unauthorized absences extended past the effective date of the 1979 amendment. Thus he cannot avoid military prosecution even if his retroactivity argument succeeds, and "[n]eedless friction" (see *Noyd* v. *Bond*, *supra*, 395 U.S. at 696) between the federal district courts and the military system can best be avoided by permitting the military tribunal to resolve his jurisdictional claim in the first instance.

While petitioner did seek to have the district court order his release from the military, and the district court's denial of relief was affirmed by the court of appeals, it is not clear that petitioner raises this issue in this Court. In any event, petitioner has made no attempt to exhaust his administrative remedies.[5] We are advised by the Department of the Navy that petitioner could have sought relief for an invalid enlistment from the Commander, Naval Military Personnel Command, or from the Board for Correction of Naval Records (see 10 U.S.C. 1552; 32 C.F.R. Part 723). The record does not reflect that petitioner took either step.[6]

---

[5] In addition, while the government stipulated that petitioner's enlistment was contrary to internal Navy rules (see note 1, *supra*), petitioner has not shown that "[h]e is in custody in violation of the Constitution or laws or treaties of the United States * * *" (28 U.S.C. 2241(c)(3)). It is therefore not apparent that petitioner could obtain habeas corpus relief to secure his release from the Navy even if his allegations were true and he had exhausted his administrative remedies.

[6] Petitioner asserts (Pet. 4) that "[n]o administrative remedies were available * * * at the time that this action was commenced." Petitioner may be suggesting that the Navy would not ordinarily consider discharging a serviceman while court-martial proceedings are pending. Even if this is true, it does not follow that the administrative remedies are inadequate. In *Parisi*, the Court explicitly endorsed the practice of delaying a discharge to which a serviceman is entitled, pending the outcome of court-martial proceedings, in those cases in which the military tribunal must determine whether the basis for the discharge furnished a defense to the court-martial prosecution. 405 U.S. at 45 n.13, 46 & n.15.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

STUART E. SCHIFFER
Acting Assistant Attorney General

LEONARD SCHAITMAN
SANDRA WIEN SIMON
Attorneys

JUNE 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 349865 320